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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 Samuel A.,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL,
14 Deputy Commissioner of Social
15 Security for Operations,

16 Defendant.

CASE NO. 3:18-cv-05466-JRC

ORDER

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13. *See* Dkt. 2, Consent to Proceed before a United
19 States Magistrate Judge. This matter has been fully briefed. *See* Dkts. 10, 11, 12.

20 After considering and reviewing the record, the Court finds that the ALJ failed to
21 provide clear and convincing reasons for discounting plaintiff's testimony regarding the
22 severity of his impairments. First, the fact that plaintiff has carried on certain daily
23 activities does not necessarily detract from his testimony that he is unable to work.
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1 Second, the ALJ's finding that plaintiff failed to seek treatment is not supported by
2 substantial evidence, and plaintiff offered an explanation, which the ALJ failed to
3 properly consider. These errors are not harmless because had the ALJ properly
4 considered plaintiff's testimony regarding his mental and physical limitations, the ALJ
5 may have included additional limitations in plaintiff's residual functional capacity
6 ("RFC"), and in the hypotheticals presented to the vocational expert ("VE").
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8 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
9 U.S.C. § 405(g) to the Deputy Commissioner of Social Security ("Commissioner") for
10 further proceedings consistent with this Order.

11 Because the ALJ's errors relating to plaintiff's subjective symptom testimony
12 affect the entire proceedings, and plaintiff will be able to present new evidence and new
13 testimony on remand, the ALJ must reassess plaintiff's testimony, the medical evidence,
14 the RFC, and the findings at step and five, if necessary.

15 BACKGROUND

16 Plaintiff was born in 1971 and was 40 years old on the alleged date of disability
17 onset of April 4, 2011. *See* AR. 19, 173. Plaintiff has completed one year of college. AR.
18 206. Plaintiff has worked in interior design and photography. AR. 196.

19 According to the ALJ, plaintiff has at least the severe impairments of "multiple
20 sclerosis; degenerative disc disease of the lumbar and thoracic spine; and mental health
21 conditions described as depression and marijuana use disorder (20 C.F.R. [§§]
22 404.1520(c) and 416.920(c))." AR. 21.
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PROCEDURAL HISTORY

On April 4, 2014, plaintiff protectively filed a Title II application for a period of disability and disability insurance benefits (“DIB”). AR. 19, 173-77. Plaintiff also protectively filed a Title XVI application for supplemental security income (“SSI”) on April 4, 2014, 2011. AR. 19, 178-83. The applications were denied initially and following reconsideration. *See* AR. 19, 68, 69. Plaintiff’s requested hearing was held before ALJ Gary Robeck (“the ALJ”) on October 13, 2016. *See* AR. 34-54. On November 29, 2016, the ALJ issued a written decision and concluded that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 16-33. Plaintiff requested review by the Appeals Council, which denied his request for review on April 5, 2018. AR 1-6. Plaintiff then initiated this civil action. Dkt. 1.

In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether the ALJ properly evaluated plaintiff’s testimony; (2) Whether the ALJ failed to fully and fairly develop the record; (3) Whether the ALJ properly evaluated the medical evidence; and (4) Whether the ALJ properly assessed plaintiff’s residual functional capacity (“RFC”) and erred in the step five finding. Dkt. 10 at 2. Plaintiff requests that the Court remand for further proceedings. Dkt. 10 at 2, 19.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d

1 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
2 1999)).

3 DISCUSSION

4 (1) Whether the ALJ properly evaluated plaintiff's testimony.

5 Plaintiff contends that the ALJ erred when failing to credit fully his allegations
6 and testimony. Dkt. 10. Plaintiff testified that he is unable to work because of his physical
7 and mental impairments. AR. 44-45. Plaintiff testified that he has a very hard time
8 communicating with people, he gets frustrated and confused often, he loses his personal
9 belongings, and he is unable to control his emotions. AR. 39, 45-48. Regarding his
10 fatigue, plaintiff testified that does not "have energy to do stuff," and he lays down three
11 times per day for approximately 45 minutes to one hour. AR. 47. Plaintiff testified that
12 when he tries to do work, he gets hot and falls over. AR. 40. Plaintiff is unable to be in
13 the heat and not able to overexert himself. AR. 40. During the day, plaintiff does not do
14 much, he watches television, looks at the computer, and generally tries to "stay out of the
15 way." AR. 43. He has pain in his buttocks when he sits or walks 50 feet. AR. 43-44.
16 Plaintiff testified that he can concentrate for 10 minutes, after that he loses interest. AR.
17 48.

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19 The ALJ rejected plaintiff's testimony reasoning that it was inconsistent with: (1)
20 plaintiff's activities; (2) plaintiff's treatment history; and (3) the objective medical
21 evidence. AR. 24-27.

22
23 The ALJ's determinations regarding a claimant's statements about limitations
24 "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722

1 (9th Cir. 1998) (citing *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en*
2 *banc*)). In evaluating a claimant's allegations of limitations, the ALJ cannot rely on
3 general findings, but ““must specifically identify what testimony is credible and what
4 evidence undermines the claimant's complaints.”” *Greger v. Barnhart*, 464 F.3d 968, 972
5 (9th Cir. 2006) (quoting *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th
6 Cir. 1999)); *Reddick*, 157 F.3d at 722 (citations omitted); *Smolen v. Chater*, 80 F.3d
7 1273, 1284 (9th Cir. 1996) (citation omitted).

8
9 The determination of whether or not to accept a claimant's testimony regarding
10 subjective symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;
11 *Smolen*, 80 F.3d at 1281-82 (citing *Cotton v. Bowen*, 799 F.2d 1407-08 (9th Cir. 1986)).
12 First, the ALJ must determine whether or not there is a medically determinable
13 impairment that reasonably could be expected to cause the claimant's symptoms. 20
14 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. If an ALJ rejects the
15 testimony of a claimant once an underlying impairment has been established, the ALJ
16 must support the rejection “by offering specific, clear and convincing reasons for doing
17 so.” *Smolen*, 80 F.3d at 1284 (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993));
18 *see also Reddick*, 157 F.3d at 722 (citing *Bunnell*, 947 F.2d at 343, 346-47).

19 A. Plaintiff’s activities

20 The Ninth Circuit has recognized two grounds for using daily activities to form the
21 basis of an adverse credibility determination: (1) whether the activities contradict the
22 claimant’s other testimony and (2) whether the activities of daily living meet “the
23 threshold for transferable work skills.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).
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1 “A single discrepancy fails, however, to justify the wholesale dismissal of a claimant's
2 testimony.” *Popa v. Berryhill*, 872 F.3d 901, 906-07 (9th Cir. 2017).

3 The ALJ found that plaintiff’s activities were inconsistent his alleged symptoms
4 and limitations. AR. 26. The ALJ cited to plaintiff’s work history, ability to drive, shop
5 at stores and on the internet, and manage his money. AR. 26.

6 1. *Work history*

7 The ALJ found that plaintiff’s reports of working as a web designer, working on
8 an internet business, and doing photography “strongly suggest[] that [plaintiff] could
9 perform and sustain unskilled work.” AR. 27.

10 As an initial matter, because plaintiff earned less than substantial gainful levels, it
11 is undisputed that this work did not satisfy the ALJ’s step-one inquiry or qualify as past
12 relevant work. *See* Dkt. 10, 11; AR. 21.

13 The record reflects that plaintiff’s work history is much more limited than the ALJ
14 noted. Plaintiff testified that he last worked in 2007, and since then, he has tried to work,
15 but he did not make any money. AR. 38-39. In a May 2014 treatment note, plaintiff
16 reported that he was self-employed as a photographer, had not worked in over a year, and
17 did not feel capable of running a business. AR. 318. With respect to plaintiff’s web
18 design, plaintiff reported that he spent most of his time “star[ing] at the computer” and
19 “nearly completed” two websites, but only made four sales in seven months. AR. 380.
20 Plaintiff reported that he needed to take “a number of steps” before another website could
21 “go live,” but he found himself unmotivated to do so. AR. 380. *See also* AR. 381.

1 While this evidence is relevant, plaintiff's unsuccessful attempts at part-time work
2 do not provide substantial evidence to support the ALJ's adverse credibility
3 determination. *See Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) ("[o]ccasional
4 symptom-free periods—and even the sporadic ability to work—are not inconsistent with
5 disability"). None of these activities are inconsistent with plaintiff's testimony nor do
6 they show that plaintiff could perform any type of full-time work on a sustained basis.

7 The Commissioner also cites *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
8 1228 (9th Cir. 2009), for the proposition that part-time work can undermine subjective
9 complaints. Dkt. 11 at 10. *Bray*, however, is inapposite. In *Bray*, the claimant was
10 successful in her recent part-time work; and that fact coupled with seeking out other
11 employment after that work concluded provided a permissible rationale to discount her
12 testimony. *Id.* at 1221-27. Here, by contrast, plaintiff was unable to maintain part-time
13 work; nor did plaintiff work for pay since 2007. *Bray*, therefore, does not control here.

14 Therefore, this is not a clear and convincing reason to reject plaintiff's subjective
15 symptom testimony.

16 2. *Ability to drive, shop, and manage money*

17 The ALJ also found that plaintiff's activities of daily living belied his subjective
18 symptom testimony. AR. 26-27. In support of this conclusion, the ALJ cited to evidence
19 demonstrating that plaintiff's function report did not indicate problems with shopping in
20 stores or handling money. AR. 26 (citing AR. 229). The ALJ also cited to evidence that
21 plaintiff did not drive because of his vision problem, but told the examining
22 psychologist that he did some driving. AR. 26 (citing AR. 381).

1 The ALJ's finding that plaintiff's daily activities are inconsistent with his
2 testimony that he is unable to work is not supported by substantial evidence. First,
3 while the ALJ cited to plaintiff's ability to shop, plaintiff reported that he only shops by
4 computer, which takes approximately 30 minutes. AR. 229. Plaintiff's shopping appears
5 to be a very minor part of plaintiff's day and says little about his ability to communicate
6 or interact with others, fatigue, or the extent of his pain. Moreover, the Ninth Circuit has
7 "repeatedly asserted that the mere fact that a plaintiff has carried on certain daily
8 activities, such as grocery shopping ... does not in any way detract from her credibility as
9 to her overall disability. One does not need to be 'utterly incapacitated' in order to be
10 disabled." *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (citing *Fair*, 885 F.2d
11 at 603); *see Reddick*, 157 F.3d at 722 (recognizing "disability claimants should not be
12 penalized for attempting to lead normal lives in the face of their limitations").

14 Regarding his ability to drive, the ALJ referred to evidence wherein plaintiff
15 reported that he does not like to drive because of his reduced vision, *see* AR. 229, and a
16 2014 treatment note in which plaintiff reported that he only drives in his neighborhood
17 and avoids the freeway because he has lost sensitivity in his hands, AR. 381. As an
18 initial matter, none of this evidence is necessarily inconsistent with plaintiff's
19 testimony, in which plaintiff stated that he drives "poorly" and only drives to the 7-11
20 store. AR. 41. And even if it were inconsistent, this evidence presents the type of
21 "single discrepancy," which fails to justify discrediting plaintiff's entire testimony. *See*
22 *Popa*, 872 F.3d at 906-07 (discussing inconsistency between the plaintiff's testimony that
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1 she could not drive because her license was suspended and her comment to a treating
2 physician that she had driven).

3 Lastly, plaintiff's ability to manage money is primarily a solitary and in-home
4 activity, and has no bearing on his testimony that he is unable to work because he is
5 tired, unable to concentrate, forgetful, and unable to get along with others. There is no
6 evidence in the record that plaintiff was required to work with others in or unable to rest
7 while managing his money. *See generally* AR. 34-54 (hearing testimony), 226-233
8 (function report). Therefore, without more, plaintiff's ability to manage his own funds
9 does not provide a clear and convincing reason, supported by substantial evidence, to
10 discredit his testimony.
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12 Nor would the record support a finding that plaintiff's activities are transferable
13 to a work setting and that plaintiff spends a substantial part of his day on them, even if
14 the ALJ had made such a finding. *See Smolen*, 80 F.3d at 1284 & n.7. Rather, plaintiff's
15 daily activities are "so undemanding that [they] cannot be said to bear a meaningful
16 relationship to the activities of the workplace." *Orn*, 495 F.3d at 639. *Trevizo v. Berryhill*,
17 871 F.3d at 871 F.3d 664, 682 (9th Cir. 2017) (Many home activities are not easily
18 transferable to a work environment, "where it might be impossible to periodically rest or
19 take medication."); *See* 20 C.F.R. Pt. 404, Subpart P, Appendix 1, § 12.00 C(3) (A
20 claimant's ability to function in a work environment should not be determined based on
21 an individual's ability to perform tasks in other settings that are less demanding, highly
22 structured, or more supportive.).
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1 Therefore, the ALJ's finding that plaintiff's daily activities are inconsistent with
2 his testimony is not a clear and convincing reason to discount plaintiff's subjective
3 symptom testimony.

4 B. Treatment history

5 The ALJ found plaintiff's treatment history suggests that his impairments would
6 not prevent him from working full-time at a modified light exertional level. AR. 224. The
7 ALJ referenced three periods in which plaintiff purportedly failed to seek treatment: (1)
8 plaintiff's gap in treatment for his MS between 2011 and 2013; (2) plaintiff's failure to
9 seek treatment for his back pain and MS after 2014; and (3) plaintiff's failure to seek
10 mental health treatment after 2014. AR. 24-26.

12 An "unexplained, or inadequately explained, failure to seek treatment or follow a
13 prescribed course of treatment" is a clear and convincing reason for discounting the
14 credibility of a claimant's subjective symptom statements, unless the claimant provides
15 sufficient reasons. *Bunnell v. Sullivan*, 947 F.2d 341, 346–47 (9th Cir. 1991) (en banc);
16 accord *Molina*, 674 F.3d at 1113; see *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).
17 The Ninth Circuit has found that one good reason is a claimant's failure to obtain
18 treatment due to lack of funds. See e.g., *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007)
19 (citing *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995)).

20 1. *MS Treatment Between 2011 and 2013*

21 The ALJ found that plaintiff failed to seek treatment for his MS between 2011 and
22 2013. AR. 24. The ALJ noted that plaintiff did not have health insurance during this
23 time, but stated that "this is not a persuasive explanation for the long treatment gap[.]"
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1 and reasoned that plaintiff did not seek emergency treatment or treatment from
2 community resources for any symptoms. AR. 24.

3 Here, while the ALJ considered plaintiff's reason for failing to seek treatment, his
4 lack of healthcare, the ALJ's analysis is contrary to Ninth Circuit law. As the ALJ
5 acknowledges, plaintiff's gap in treatment coincides with a period in which plaintiff did
6 not have health insurance. The Ninth Circuit has held that "disability benefits may not be
7 denied because of the claimant's failure to obtain treatment [he or she] cannot obtain for
8 lack of funds." *See Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (quoting *Gamble v.*
9 *Chater*, 68 F.3d 319, 321 (9th Cir. 1995)); *Regennitter v. Comm'r of the Soc. Sec. Admin.*,
10 166 F.3d 1294, 1297 (9th Cir. 1999).

12 With respect to the ALJ's reasoning that plaintiff did not seek emergency
13 treatment despite being able to do so in the past, the fact that plaintiff sought emergency
14 treatment once in 2012, *see* AR. 24, 433, does not sufficiently rebut plaintiff's
15 explanation that he lacked healthcare. It is not clear to the Court that because plaintiff
16 visited the urgent care once in 2012, that he would have access to routine healthcare
17 between 2011 and 2013. Moreover, the evidence reflects that plaintiff was not aware that
18 he had MS until mid-2013. AR. 282-83, 436-37. One would not expect a claimant to
19 routinely visit the emergency room or urgent care on a frequent basis, especially for an
20 unknown condition. The Court therefore concludes that the ALJ's finding that plaintiff
21 failed to seek treatment is not based on the proper legal standards or supported by
22 substantial evidence.
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1 2. *Back Pain and MS Treatment in Late 2014*

2 Next, the ALJ found that plaintiff has not required opioid pain management or
3 steroid injections for his back pain symptoms. AR. 26. Evidence of conservative
4 treatment is sufficient to discount a claimant's testimony regarding the severity of an
5 impairment. *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007).

6 However, contrary to the ALJ's findings, plaintiff treated his pain with topical
7 marijuana product and reported that his symptoms were not improved with physical
8 therapy. AR. 49, 410. Plaintiff was also prescribed and taking Tecfidera, a prescription
9 medication for MS, at the time of the hearing. AR. 48-49. Daily use of a prescribed
10 medication to treat pain is not evidence of conservative treatment, nor does it contradict
11 plaintiff's subjective symptom testimony. *See Akers v. Colvin*, 2014 WL 1236293, at *7
12 (D. Or. Mar. 25, 2014) (Plaintiff's use of medical marijuana was not a clear and
13 convincing reason to reject her credibility as conservative treatment.).

14 The ALJ also noted that the evidence failed to show that plaintiff was seeing a
15 specialist for his MS on a regular basis after late 2014 for his MS and back pain. AR. 26.
16 However, the ALJ failed to acknowledge that plaintiff did seek treatment in 2015 and
17 2016 for his MS, and his back pain was related to that condition. AR. 439-44. Plaintiff
18 had numerous MRIs in 2015 and 2016, which indicated a progression of his MS and
19 related back pain. For example, plaintiff's 2015 thoracic spine MRI showed:
20 "Coincidentally, more clearly evident on today's exam is a focal right paracentral disc
21 herniation with slight cephalad extrusion which deforms the right ventral cord just
22 overlying the area of signal abnormality at the T5-6 level." AR. 443. And later in 2016,
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1 another thoracic MRI indicated: “A previous small right paracentral disc protrusion at
2 T5-6 now appears to be a broad-based bulge.” AR. 440. A 2016 brain MRI showed:
3 “Stable appearance to multiple scattered demyelinating lesions about the bilateral
4 cerebral hemispheres compatible with history of multiple sclerosis.” AR. 442. The record
5 also reflects that plaintiff was under the care of neurologist, Michelle Moon, D.O. in
6 2016. AR. 436. In October 2014, after six physical therapy sessions, plaintiff reported
7 that therapy and a course of anti-inflammatory medication had not improved his back
8 pain. AR. 413.

9
10 Thus, there is evidence in the record that plaintiff sought treatment for his MS and
11 back pain between late 2014 and 2016, and there is no indication that additional treatment
12 or medication was available that might provide any therapeutic effect. Thus, the ALJ’s
13 finding is not supported by substantial evidence. *See Orn*, 485 F.3d at 638.

14 Therefore, the Court concludes that the ALJ’s finding that plaintiff’s subjective
15 symptom testimony was inconsistent with his treatment history is not supported by
16 substantial evidence.

17 *3. Mental Health Treatment after 2014*

18 Next, the ALJ found that plaintiff’s limited mental health treatment was
19 inconsistent with his allegations. AR. 26.

20 Here, the record reflects that plaintiff sought mental health counseling in Seattle
21 once, but was unable to continue because he could not sit in the car and handle the stress
22 of the travel. AR. 52-53 (plaintiff was living in Vancouver, Washington at the time).

23 Here, the ALJ erroneously questioned the severity of plaintiff’s symptoms because
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1 plaintiff has not consistently sought mental health treatment without exploring possible
2 explanations for that lack of treatment, including an inability to travel for treatment and a
3 possible causal relationship between the mental illness and failure to seek treatment. *See*
4 SSR 16-3p; *Nguyen v. Chater*, 100 F.3d 1452, 1465 (9th Cir. 1996) (“[I]t is a
5 questionable practice to chastise one with a mental health impairment for the exercise of
6 poor judgment in seeking rehabilitation.”). Thus, this is not a clear and convincing reason
7 to reject plaintiff’s subjective symptom testimony.

8
9 C. Objective evidence

10 Determining a claimant’s complaints are “inconsistent with clinical observations”
11 can satisfy the clear and convincing requirement. *Regennitter*, 166 F.3d at 1297; *see also*
12 *Fisher v. Astrue*, 429 F. App’x 649, 651 (9th Cir. 2011). However, an ALJ “may not
13 disregard [a claimant’s credibility] solely because it is not substantiated affirmatively by
14 objective medical evidence.” *Robbins v. Social Security Administration*, 466 F.3d 880,
15 883 (9th Cir. 2006); *see Ortez v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995); *Byrnes v.*
16 *Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995).

17 The ALJ provided three reasons for discounting plaintiff’s statements. AR. 24-27.
18 The Court has determined that the ALJ’s first two reasons for discounting plaintiff’s
19 subjective symptom testimony – plaintiff’s activities and treatment history– are improper.
20 The only remaining reason for discounting plaintiff’s complaints is because the
21 complaints are inconsistent with the objective evidence. *See* AR. 24-26. As this is the
22 sole remaining reason and as a claimant’s testimony may not be rejected solely on the
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1 basis of inconsistencies with the objective evidence, the Court need not determine if the
2 third reason is proper.

3 The Court finds the ALJ has not provided legally sufficient reasons for
4 discounting plaintiff's subjective symptom testimony. Accordingly, the ALJ erred.

5 D. Harmless error

6 “[A] reviewing court cannot consider [an] error harmless unless it can confidently
7 conclude that no reasonable ALJ, when fully crediting the testimony, could have reached
8 a different disability determination.” *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir.
9 2015) (quoting *Stout v. Comm’r*, 454 F.3d 1050, 1055–56 (9th Cir. 2006)).
10

11 The ALJ failed to give a clear and convincing reason supported by substantial
12 evidence for rejecting plaintiff's subjective symptom testimony. Plaintiff's testimony
13 included limitations greater than those incorporated into the RFC and in the hypothetical
14 questions posed to the VE. For example, plaintiff testified that he is unable to work
15 because he cannot get along with other people, is unable to concentrate, and he is too
16 tired. AR. 39, 44-45. The ALJ found plaintiff has the RFC to perform light work with
17 limitations. AR. 23-24. Therefore, if the ALJ had fully credited plaintiff's testimony, the
18 ultimate disability determination may have changed. Thus, the error was not harmless.

19 (2) Whether the ALJ failed to fully and fairly develop the record and properly
20 evaluated the medical evidence.

21 Plaintiff contends that the ALJ failed to obtain medical records from the
22 Vancouver Clinic including plaintiff's primary care physician, Gary Pape, M.D., and his
23 treating neurologist, Dr. Moon. Dkt. 10 at 3. Plaintiff contends the ALJ should have
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1 obtained neuropsychological testing of plaintiff and obtained medical expert testimony to
2 determine whether plaintiff meet Listing 11.09B. Dkt. 10 at 4. Plaintiff also alleges that
3 the ALJ erred in his assessment of the medical opinion evidence. Dkt. 10.

4 The Court has determined that remand is necessary due to the ALJ's harmful
5 errors regarding plaintiff's subjective symptom testimony. *See* Section 1, *supra*. In light
6 of the inevitable remand, the Court declines to consider whether the ALJ failed to fully
7 and fairly develop the record. Instead, on remand, further evidence may be considered,
8 including additional examinations and, if necessary, medical expert testimony to resolve
9 conflicts and ambiguities in the record. *See Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th
10 Cir. 1995) (citations omitted) (the "claimant bears the burden of proving" the "ultimate
11 issue of disability"). Furthermore, the Court directs the ALJ to reassess all evidence as
12 necessary on remand – including the opinion evidence – in light of any additional
13 medical evidence and proper consideration of plaintiff's subjective symptom testimony.
14

15 (3) Whether the ALJ improperly determined plaintiff's RFC and the findings at
16 step five.

17 Plaintiff contends that the ALJ erred in assessing his RFC and finding him not
18 disabled at step 5 of the sequential evaluation process because the RFC and
19 hypothetical questions did not contain all of plaintiff's functional limitations. Dkt. 10 at
20 18-19. In Section One, the Court concludes that the ALJ committed harmful error when
21 he failed to properly evaluate plaintiff's subjective symptom testimony. The ALJ is
22 directed to re-evaluate the medical evidence, and plaintiff's subjective symptom
23 testimony on remand. *See* Sections 1 and 2, *supra*. Therefore, on remand, the ALJ must
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1 also reassess plaintiff's RFC. *See* Social Security Ruling 96-8p ("The RFC assessment
2 must always consider and address medical source opinions."); *Valentine v. Commissioner*
3 *Social Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to take into
4 account a claimant's limitations is defective"). Because the ALJ must reassess plaintiff's
5 RFC on remand, he must also re-evaluate the findings at Step 5 to determine if there are
6 jobs existing in significant numbers in the national economy that plaintiff can perform in
7 light of the new RFC.

8 9 REMAND INSTRUCTIONS

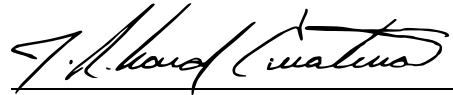
10 The parties agree that if the ALJ erred, then further administrative proceedings are
11 warranted. Dkts. 10, 11. On remand, the ALJ is instructed to reassess plaintiff's
12 testimony, the medical evidence, the RFC, and the findings at step five, if necessary.

1 CONCLUSION

2 Based on these reasons, and the relevant record, this matter is **REVERSED** and
3 **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Deputy
4 Commissioner for further proceedings consistent with Order.

5 **JUDGMENT** is entered for **plaintiff** and the case is closed.

6 Dated this 25th day of March, 2019.
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12 J. Richard Creatura
13 United States Magistrate Judge
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